IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE, et al.,
Petitioners,

v.

EDWARD J. & DEBORA A. HUDSPETH
Respondents.

On Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

BRIEF OF THE RESPONDENTS

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QUESTION PRESENTED

In enacting the Bankruptcy Code's comprehensive system for the fair and equitable adjustment of a debtor's financial obligations, did Congress intend to permit chapter 13 debtors to provide for and, in some cases, discharge state criminal restitution payment obligations pursuant to 11 U.S.C. § 1328(a)?

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STATUTES INVOLVED

This case primarily involves 11 U.S.C. § 101(4), (11), concerning the definition of "claim" and "debt"; 11 U.S.C. § 523(a), concerning exceptions to discharge in chapter 7 bankruptcy cases; and 11 U.S.C. § 1328, concerning discharge in chapter 13 cases. Also involved are Pennsylvania's laws on welfare fraud, Pa. Stat. Ann. tit. 62, § 481 (Purdon 1968 & Supp. 1989); and restitution, 18 Pa. Cons. Stat. Ann. § 1106 (Purdon 1983). These statutes are set forth verbatim in the Petition for a Writ of Certiorari.

Respondents will also refer to the Supremacy Clause; 11 U.S.C. § 362, concerning the automatic stay; 11 U.S.C. § 726, concerning distribution of property of the estate; and 18 U.S.C. § 3613, concerning dischargeability of federal fines. These statutes are set forth verbatim in the Appendix to Brief of the Respondents.

STATEMENT OF THE CASE

The facts of this case are not in dispute. From September, 1984 to April, 1985, respondents Edward J. and Debora A. Davenport received public assistance and food stamps while receiving sporadic disability benefits. Petitioner Pennsylvania Department of Public Welfare (DPW) determined that Mr. & Mrs. Davenport had received overpayments of public assistance and a criminal prosecution was initiated in the Bucks County (Pennsylvania) Court of Common Pleas. J.A. 56a-69a; 3d Cir. App. 47a-49a.

On September 17, 1986, the Davenports pleaded guilty to making false statements in order to secure the public assistance and food stamps. J.A. 70a, 72a. They were sentenced to one year probation and ordered to make full restitution, as mandated by Pennsylvania law. Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989).

Several months later, the Davenports received a letter from petitioner Adult Probation and Parole Department of the Court of Common Pleas of Bucks County (Probation Depart-

ment). This letter instructed the Davenports to commence paying the restitution at a total rate of $416 per month beginning December 1986, and continuing until they had remitted a total of $4,144.80. J.A. 32a. At the time they filed their chapter 13 statement in the bankruptcy court, the Davenport's total gross monthly income was $1,064 and their necessary expenses (food, clothing and shelter) were $1,037. J.A. 17a.[1] Under Pennsylvania law, the Probation Department was required to forward the payments to DPW. 18 Pa. Cons. Stat. Ann. § 1106(e) (Purdon 1983).

On May 15, 1987, the Davenports filed a petition under chapter 13 of the Bankruptcy Code. The restitution obligation was listed in their chapter 13 statement as an unsecured debt payable to DPW. J.A. 18a. In addition, the Probation Department was given notice of the bankruptcy by letter on July 20, 1987. J.A. 37a.

The debtors' chapter 13 plan, J.A. 20a, provided that DPW would receive treatment equal to the other unsecured creditors.[2] Neither DPW nor the Probation Department filed a proof of claim in the bankruptcy case. On October 20, 1987, there being no objection from any creditor, the bankruptcy court, upon the trustee's recommendation, confirmed the debtors' plan. J.A. 2a. No appeal was taken from the confirmation

[1] The record does not reflect the amount of the Davenports' income at the time of sentencing in September 1986. However, it was apparently the Probation Department that set the monthly payment amount (J.A. 32a; 3d Cir. App. 49a, 63a-66a), not the court, despite the fact that Pennsylvania law requires this to be a judicial decision. *See Commonwealth* v. *Valent*, 317 Pa. Super. 145, 463 A.2d 1127 (1983); *Commonwealth* v. *Wood*, 300 Pa. Super. 463, 446 A.2d 948 (1982). It does not appear that any factual determinations were made by any entity regarding the Davenports' ability to pay before the restitution payment schedule was imposed.

[2] The assertion at p. 2 of the brief filed by amicus Washington Legal Foundation that the plan provided for no payments to DPW and other unsecured creditors is incorrect.

order. The Davenports eventually successfully completed their plan and received a discharge under 11 U.S.C. § 1328(a) on July 8, 1988. J.A. 3a.[3]

When the debtors failed to make restitution payments as instructed by the Probation Department, that entity commenced a probation violation proceeding in July, 1987. J.A. 34a. The Davenports notified the Probation Department of the pending bankruptcy proceeding and requested withdrawal of the probation violation charges. J.A. 37a. The Probation Department refused, and the debtors commenced an adversary proceeding in bankruptcy court seeking a declaration that the restitution was a dischargeable debt. J.A. 26a. A hearing in the adversary proceeding was held on October 26, 1987, 3d Cir. App. 41a-161a, and the bankruptcy court took the case under advisement. On October 29, 1987, the Probation Department proceeded with a violation of probation hearing in Bucks County. 3d Cir. App. 162a-178a. The Court of Common Pleas denied the motion to revoke probation. 3d Cir. App. 178a.

The bankruptcy court issued its decision on March 8, 1988, ruling that the restitution obligation was dischargeable under 11 U.S.C. § 1328(a). *In re Davenport*, 83 B.R. 309 (Bankr. E.D. Pa. 1988). On appeal, the district court reversed, holding that the restitution obligation was not a debt as defined by the Bankruptcy Code and that a discharge would violate principles of federalism. *Davenport* v. *Pennsylvania*, 89 B.R. 428 (E.D. Pa. 1988).

On appeal by the Davenports, the United States Court of Appeals for the Third Circuit reversed. *In re Johnson-Allen*, 871 F.2d 421 (3d Cir. 1989). The court of appeals ruled that a criminal restitution obligation is a debt as defined by the Bankruptcy Code because it is a "right to payment," 11 U.S.C. § 101(4), (11), a term of sufficient breadth to include a restitution obligation as to which any person has a right to payment,

[3] Because petitioners filed no proof of claim, the chapter 13 trustee made no distributions to the petitioners under the confirmed plan.

and that the debt is dischargeable in chapter 13 bankruptcy cases pursuant to 11 U.S.C. § 1328(a).

SUMMARY OF ARGUMENT

The order of restitution entered by the Court of Common Pleas of Bucks County required respondents to make monthly payments to the Probation Department as a condition of probation. That court-ordered payment obligation imposed a "debt" on respondents and created, on behalf of petitioners, a right to payment, or "claim," under the Bankruptcy Code.

Under the plain language of the Code, consistent with the relevant legislative history, restitution is included in the broad definition of "debt" or "claim." Congress specifically codified a pre-Code judicial exception to discharge for restitution in chapter 7 cases, and did not carry over that exception to some chapter 13 cases. Restitution would not have to be excepted from discharge under chapter 7 had Congress not considered restitution a debt in the first instance. Congressional intent to include restitution in the definition of claim is also gleaned from the Code provisions regarding distribution, 11 U.S.C. § 726, and the automatic stay, 11 U.S.C. § 362, as well as recent amendments to the federal criminal code which specifically excepted federal fines from discharge.

Classifying restitution as a claim is necessary to effectuate the policies underlying chapter 13. Congress intended chapter 13 to be an attractive alternative to the straight liquidation of chapter 7. By allowing chapter 13 debtors to adjust all their financial obligations, Congress accomplished the two fundamental purposes of bankruptcy: the equal treatment of creditors and a fresh start for debtors. Placing restitution outside bankruptcy would frustrate the full effectiveness of chapter 13 because it would provide petitioners more favorable treatment than that accorded other creditors, including other creditors owed debts that are nondischargeable under chapter 7. In addition, a debtor's ability to formulate a feasible plan to deal with all his debts would be unduly hampered.

Debtors here do not seek to invoke the equitable power of a federal court to enjoin a state court proceeding. Instead, debtors seek a judicial declaration whether restitution is a debt under the Code.

A declaration that restitution is a debt will not trigger a great increase of chapter 13 filings. The power of a bankruptcy court to deny confirmation if a plan is not filed in good faith, the creditors' right to require the debtor to commit all disposable income to the plan, and the very modest statutory exemptions available to debtors combine to prevent abuse of the bankruptcy process. Any individual who has the ability to pay restitution can expect no advantage by filing bankruptcy under chapter 13.

In the final analysis, the Constitution gives Congress, not the states, the power to define the scope of dischargeability in bankruptcy. To the extent state law conflicts with federal law, the latter controls. Allowing creditors to avail themselves of state criminal proceedings to collect debts is in direct contravention of Congress' intent to allow a chapter 13 debtor to provide in his plan of reorganization for all obligations giving rise to a right to payment.

ARGUMENT

I. A CRIMINAL RESTITUTION OBLIGATION IS A DEBT WITHIN THE MEANING OF THE BANKRUPTCY CODE

A. Introduction

In *Kelly* v. *Robinson*, 479 U.S. 36 (1986), this Court held that a restitution obligation imposed as a condition of probation in state criminal proceedings is not dischargeable in a chapter 7 bankruptcy case. Specifically, the Court held that the obligations are rendered nondischargeable by 11 U.S.C. § 523(a)(7), which bars the discharge of a debt in a chapter 7 case "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." *Kelly*, 479 U.S. at 52. The

Court's holding in *Kelly* also rendered restitution obligations nondischargeable in all chapter 12 cases as well as many chapter 11 and chapter 13 cases. *See* 11 U.S.C. § 1141(d)(2), (3); *id.* § 1228(a)(2); *id.* § 1328(b).

The Court's decision in *Kelly* was grounded on its construction of § 523(a)(7). That provision was enacted "against the background of an established judicial exception to discharge for criminal sentences, including restitution orders." *Kelly*, 479 U.S. at 46. Concluding that the language of § 523(a)(7) is "subject to interpretation," *Kelly*, 479 U.S. at 50, and finding no evidence in the legislative history that Congress intended to change pre-Code law, the Court held that § 523(a)(7) "codifies the judicially created exception to discharge for fines." *Kelly*, 479 U.S. at 51. The Court further found that the qualifying language of § 523(a)(7), which states that a fine, penalty, or forfeiture is nondischargeable only if it is "payable to and for the benefit of a governmental unit" and "not compensation for actual pecuniary loss" did not apply to restitution obligations. The Court held that the state's rehabilitation and penal interests served by restitution are sufficient to place restitution obligations within the scope of § 523(a)(7).

In this case, unlike in *Kelly*, the focus of the inquiry is not whether restitution is "compensation for actual pecuniary loss" within the meaning of § 523(a)(7), but rather, more fundamentally, the scope of the terms "debt" and "claim" under the Code. *See* 11 U.S.C. § 101(4), (11). In *Kelly*, the Court reserved judgment on the issue whether the terms "debt" and "claim," which are defined expansively in the Code, encompass a debtor's obligation to make restitution payments. *Kelly*, 479 U.S. at 50.

If a restitution obligation is held to be a "debt" cognizable in bankruptcy, there can be no doubt that it is dischargeable in some chapter 13 cases. Sections 1328(a) and (b) provide for two types of discharges in chapter 13 cases. The first kind of discharge, provided by § 1328(a) for debtors who complete their plan payments, is broader than the discharge provided under chapter 7. Section 523(a) excepts ten categories of debt from

discharge under chapter 7. Section 1328(a) incorporates only one of those categories, debts "of the kind specified in section 523(a)(5),"[4] in its list of debts excepted from discharge under chapter 13. Congress' adoption in § 1328(a) of only one of the § 523(a) exceptions makes it clear that the other nine types of debts identified as nondischargeable under § 523(a) are dischargeable under § 1328(a).[5] The second type of chapter 13 discharge, the "hardship" discharge provided by § 1328(b), when a debtor cannot complete his plan payments, does not discharge any of the kinds of debts listed in § 523(a).[6]

As explained more fully below, Congress' intent to define restitution as a debt under the Code is directly discernible not only from the plain language of the statute itself but from other sources, including the legislative history of the definitional provisions of the Code, the enactment of § 523(a)(7) against the background of the pre-Code judicial decisions excepting restitution from discharge, and the enactment of other recent legislation. Moreover, the conclusion that restitution is a dischargeable debt is in harmony with other Code provisions and the statutory scheme as a whole.

B. The Plain Language of § 101 And Its Legislative History Establish Congress' Intent To Alter Pre-Code Law And To Broaden Substantially The Scope Of The Term "Debt"

1. The Plain Language Of § 101(4) Encompasses Restitution Obligations

As in all cases of statutory interpretation, the starting point in this case must be the statutory language itself. *United States*

[4] Section 523(a)(5) refers to certain debts for "alimony," "maintenance" or "support" of a spouse, former spouse or a child of the debtor.

[5] Respondents do not understand petitioners or their supporting amici to argue otherwise.

[6] Under § 1328(b), a court may grant a discharge to a chapter 13 debtor who has not made all of the payments required by the confirmed chapter 13 plan if, *inter alia*, such failure "is due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b).

v. *Ron Pair Enters., Inc.*, 109 S.Ct. 1026, 1030 (1989); *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." *Immigration and Naturalization Servs.* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Where the terms of a statute are unambiguous, only the "most extraordinary showing of contrary intentions" from the legislative history would justify limiting the statute's plain language. *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).[7] As long as the framework of the Code is coherent and consistent, there is generally no need to look beyond the plain language. *Ron Pair*, 109 S.Ct. at 1030.

The Code defines a debt as "liability on a claim." 11 U.S.C. § 101(11). "Claim," in turn, is defined as a

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

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[7] Many of the arguments raised by petitioners and supporting amici focus on what they consider to be negative policy ramifications of the court of appeals' ruling in this case. However, this Court has recently cautioned against ignoring the plain language of a statute on such grounds:

> [W]e decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute and to ignore much of the legislative history. Congress chose the language that requires us to decide as we do, and Congress is free to change it.

Mansell v. *Mansell*, 109 S.Ct. 2023, 2031 (1989).

11 U.S.C. § 101(4).[8]

The court of appeals properly focused its inquiry on the question whether a restitution obligation gives rise to a "right to payment" under Pennsylvania law. *See, e.g., In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir. 1988) (existence of claim is determined by reference to rights created by state law or, where applicable, federal law (*citing Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156 (1946))).

The Pennsylvania statute under which the Davenports were prosecuted mandates the payment of restitution in the following terms:

> Any person committing a crime enumerated in subsection (a) *shall be ordered to pay restitution of any moneys* he has received by reason of any false statement, misrepresentation, impersonation, failure to disclose required information or fraudulent means.

Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989) (emphasis added). The applicable Pennsylvania statute defines restitution as "[t]he return of the property of the victim or *payments in cash or the equivalent thereof* pursuant to an order of the court." 18 Pa. Cons. Stat. Ann. § 1106(h) (Purdon 1983) (emphasis added). The court may order that restitution be paid in a lump sum or in monthly installments. 18 Pa. Cons. Stat. Ann. § 1106(c)(2) (Purdon 1983); Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989). Further, the beneficiary of a restitution order retains the supplemental right to seek a civil judgment for damages. Any such civil judgment must be reduced by any

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[8] The interplay between the definitions makes it clear that the term "debt" is to be construed equally broadly as the term "claim." "The terms 'debt' and 'claim' are coextensive: a creditor has a 'claim' against the debtor; the debtor owes a 'debt' to the creditor." S. Rep. No. 989, 95th Cong., 2d Sess. 23 (1978); H.R. Rep. No. 595, 95th Cong., 1st Sess. 310 (1977).

amounts paid pursuant to the restitution order. 18 Pa. Cons. Stat. Ann. § 1106(g) (Purdon 1983).

The restitution debtor must make payments to the county probation department which then forwards the payments to the beneficiary-victim, in this case DPW. If the payments are not made, the restitution obligation may be enforced by the county probation department through contempt of court or probation violation proceedings in the Court of Common Pleas. 18 Pa. Cons. Stat. Ann. § 1106(f) (Purdon 1983).

Prior to their bankruptcy filing, the Davenports were subject to a court order directing them to pay money to the Probation Department for ultimate delivery to DPW. Certainly, a court order directing a person to pay a specified sum of money in specified monthly installments creates a "right to payment" under any plain, common meaning of the term. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *accord Mills Music, Inc.* v. *Snyder*, 469 U.S. 153, 164 (1985); *Escondido Mutual Water Co.* v. *La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). This Court has also held that the term "right" should be given its "normal and customary meaning" and that it "connotes an ascertainable and legally enforceable power." *United States* v. *Byrum*, 408 U.S. 125, 136 (1972).

Moreover, Pennsylvania law explicitly recognizes that the restitution order and the restitution debtor's civil liability to the victim are different expressions of a single payment obligation. If it were otherwise, § 1106(g) would not require that any civil judgment be reduced by the amounts paid pursuant to the restitution order. 18 Pa. Cons. Stat. Ann. § 1106(g) (Purdon 1983). *Cf. In re Compton Corp.*, 40 B.R. 875 (Bankr. N.D. Tex. 1984) (involving penalties assessed by government for violation of oil price regulations in amounts measured by victim's pecuniary losses but not distributed to the victims by the government).

Petitioners argue that no right to payment exists because DPW cannot enforce the restitution order in its own name and the Probation Department, which does have enforcement powers, lacks civil collection remedies such as attachment, levy or lien. Petitioners' Brief at 27-31. Initially, it must be recognized that, outside of Pennsylvania, some restitution statutes do give the victim direct enforcement rights.[9] It is very unlikely that Congress would have distinguished restitution obligations based on whether victims have direct enforcement rights under state law, with the result that some restitution obligations would be bankruptcy "claims" and others would not. Certainly nothing in the Code or its legislative history suggests that Congress intended to draw such a distinction. Moreover, as the court of appeals recognized, nothing in the language of the Bankruptcy Code suggests that the right to payment must be enforceable by any particular entity. *In re Johnson-Allen*, 871 F.2d at 425. That the Probation Department collects the money on behalf of DPW in no way renders the obligation any less a right to payment.[10] Indeed, acceptance of petitioners' argument that an obligation not enforceable by its ultimate beneficiary is not a debt, would have far-reaching and obviously unintended ramifications. For example, any obligation to a trust (including most corporate bonded indebtedness) would necessarily be excluded from treatment in bankruptcy where the obligation can only be enforced by a trustee.

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[9] *See, e.g.*, 18 U.S.C. § 3663(h)(2); Ala. Code § 15-18-78(a)(Supp. 1989); Del. Code Ann. tit. 11, § 4101(b)(1987); Fla. Stat. Ann. § 775.089(5) (West Supp. 1989); Ga. Code Ann. § 17-14-13(b)(1982 & Supp. 1989); Idaho Code § 19-5305 (1987); Minn. Stat. Ann. § 611A.04 subd. 3 (West 1987 & Supp. 1990).

[10] On the other hand, if restitution is conceptualized as simply a penalty owed to the government, without consideration of the Probation Department's duty to forward payments to DPW, it is equally clear that the restitution order creates a right to payment in favor of the government.

Similarly, the Code does not in any way define claim in terms of the remedies available for enforcement of the right to payment. There is no question that an enforcement remedy exists under Pennsylvania law for an obligor's failure to comply with a restitution obligation (i.e., contempt or probation revocation proceedings). As the court of appeals observed: "Certainly there can be no greater enforcement mechanism than the threat of revocation of probation and the imposition of incarceration." *Id.* at 426.[11] It is immaterial that other potential remedies are not provided. The fact remains that the restitution debtor has a legally enforceable duty to pay money and the restitution creditor has the right to receive that money as well as pursue recovery in civil and sometimes criminal proceedings.

2. The Legislative History Reveals Congress' Intent To Define The Terms "Claim" And "Debt" Expansively

The broad definition employed by Congress in defining the term "claim" (and, therefore, the term "debt" as well) was deliberately expansive. Congress' intent to alter pre-Code definitional concepts and its awareness of the consequences of the definitions employed is well documented in the Senate and House Reports:

> Paragraph (4) defines "claim." The effect of the definition is a significant departure from present law. Under present law, "claim" is not defined in straight bankruptcy. Instead it is simply used, along with the concept of provability in

[11] Petitioners suggest that because a state may not be able to incarcerate a restitution debtor who lacks an ability to pay, *see Bearden* v. *Georgia*, 461 U.S. 660 (1983), the threat of incarceration is not a meaningful remedy. However, the efficacy of a remedy in a particular case is not the point so long as the remedy itself exists. Civil judgments entered against indigent persons who lack attachable income and property under state and federal exemption laws may also make it impossible as a practical matter for a creditor to collect a debt. That does not render the underlying obligation between the parties any less a right to payment.

> Section 63 of the Bankruptcy Act, to limit the kinds of obligations that are payable in a bankruptcy case. The term is defined in the debtor rehabilitation chapters of present law far more broadly. The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters . . . *By this broadest possible definition*, and by the use of the term throughout the title 11, especially in subchapter I and chapter 5, *the bill contemplates that all legal obligations of the debtor*, no matter how remote or contingent, *will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court.*

S. Rep. No. 989, 95th Cong., 2d Sess. 21-22 (1978) ("Senate Report") (emphasis added); H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977) ("House Report") (emphasis added).[12]

Consistent with the Congressional intent evinced in the legislative history, many courts (including this Court), as well as commentators, have recognized in a variety of contexts the breadth of the Code's definition of "claim."[13] In *Ohio* v. *Kovacs*,

[12] Prior to Congress' consideration of the issue, the Commission on the Bankruptcy Laws of the United States recommended that the definition of claim be expanded and that the concept of provability be abandoned. *See* H.R. Doc. No. 93-137, pt. II, at 6, 101, 141 (1973). It is noteworthy that Congress *expanded* the Commission's proposed definition and expressed its intent to use the "broadest possible definition." *Compare id.* at 1 (definition of claim under § 1-102(9)) *with* 11 U.S.C. § 101(4).

[13] *See* 2 *Collier on Bankruptcy* ¶ 101.04 (15th ed. 1989); 3 *Norton Bankruptcy Law and Practice* § 76.02 (1981). Courts have consistently interpreted the scope of the term "claim" broadly. *See, e.g., In re Remington Rand Corp.*, 836 F.2d 825, 829 (3d Cir. 1988) ("all possible legal obligations"); *In re Robinson*, 776 F.2d 30, 36 (2d Cir. 1985) ("broadest possible"), *rev'd on other grounds*, 479 U.S. 36 (1986); *Kallen* v. *Litas*, 47 B.R. 977, 982 (N.D. Ill. 1985) ("broadest possible"); *In re Baldwin-United Corp.*, 48 B.R. 901, 903 (Bankr. S.D. Ohio 1985) ("all encompassing"); *In re Johns-Manville Corp.*, 36 B.R. 743, 754 n.6 (Bankr. S.D. N.Y. 1984) ("broadest possible"); *In re Smith Jones, Inc.*, 26 B.R. 289, 293 (Bankr. D. Minn. 1982) ("sufficiently broad to cover any possible obligation"); *In re Thomas*, 12 B.R. 432, 433 (Bankr. S.D. Iowa 1981) ("could not be broader").

469 U.S. 274, 279 (1985), this Court effectuated the broad construction of the term "claim" by holding that an obligation to clean up a hazardous waste disposal site fell within the definition of that term. The fact that the debtor's obligation arose from governmental legal action to enforce the law rather than from a breach of private contractual obligations did not preclude this Court's finding that it was a claim. The cleanup obligation was in essence a right to payment of money enforceable by the state and, therefore, the state had a claim against the debtor. *Id.* at 283.

Petitioners and amici argue that in the absence of some express statement in the Code or the legislative history, the Court cannot conclude that Congress intended the term "claim" to encompass restitution obligations. However, as the Court recently observed in *Ron Pair*, 109 S.Ct. at 1030, Congress worked on the formulation of the Bankruptcy Code for nearly a decade and ultimately implemented significant changes in both substantive and procedural law. "In such a substantial overhaul of the system, it is not appropriate or realistic to expect Congress to have explained with particularity each step it took." *Id.* The broad language of § 101(4) plainly covers the monetary payment obligation created by a restitution order and the legislative history demonstrates that the broad scope of § 101(4) was an intended change from prior law. To the extent any further analysis is necessary, Congress' intent can be gleaned from other statutory provisions as well as the statutory scheme as a whole.[14]

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[14] Congress' intent, clearly expressed in the legislative history, to depart from the restricted concept of "debt" under prior law and the consistency between a plain reading of 11 U.S.C. § 101(4) and other Code provisions distinguish this case from *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986), and *Kelly*. In those cases, where this Court was construing § 554 and § 523(a)(7), respectively, the Court concluded that there was no evidence that Congress intended to depart from pre-Code concepts when it employed statutory language which was open to interpretation and which, if construed to give effect to its apparent plain meaning, would conflict with either other Code provisions or significant non-bankruptcy law. *Ron Pair*, 109 S.Ct. at 1032-33. Here, by comparison, the applicability of § 101(4)'s definition of "claim" as a "right to payment" to a restitution obligation is not open to interpretation and is derived from Congress' clearly expressed intent to alter and expand the scope of the term "claim" cognizable in bankruptcy. In addition, as discussed *infra*, the plain reading of § 101(4) is completely consistent with other Code provisions as well as Congress' expressed intent to expand the efficacy of the chapter 13 system. While there may be some tension between the plain meaning of § 101(4) and § 1328(a) and the Commonwealth's interest in administering its criminal justice system, " . . . Congress expressly chose to create [the] . . . tension. There is no reason to suspect that Congress did not mean what the language of the statute says." *Ron Pair*, 109 S.Ct. at 1033.

C. The Plain Language Of § 523(a)(7), The Pre-Code Background Against Which It Was Enacted And Other Recent Legislation All Demonstrate Congress' Intent To Include Restitution As A Debt Under The Code

1. Section 523(a)(7) Excepts From Discharge Monetary Obligations Which Commonly Arise Out Of Criminal Proceedings

In 11 U.S.C. § 523(a)(7), Congress excepted from discharge in all chapter 7 and chapter 12, and many chapter 11 and chapter 13 cases, any "debt" for a "fine, penalty, or forfeiture" payable to and for the benefit of a governmental unit and not as compensation for actual pecuniary loss. The plain language employed by Congress, the logical structure of this Code section, and this Court's decision in *Kelly*, establish that § 523(a)(7) was intended to apply to restitution obligations arising from criminal proceedings.

By referring to a "debt . . . for a fine, penalty, or forfeiture," Congress explicitly equated debts with the types of obligations which ordinarily do not arise between private parties but which routinely arise in governmental legal actions against its

citizens. In this respect, it is significant that at the time the Bankruptcy Code was enacted, the phrase, "fines, penalties, and forfeitures" was the title heading of chapter 229 in Title 18 of the U.S. Code relating to crimes and criminal procedure.[15] The use of the identical phrase in 11 U.S.C. § 523 (a)(7) evidences Congress' intent to include monetary sanctions arising from criminal proceedings within the scope of that section.

Moreover, the use of the term "fine" is new in the context of § 523(a); it did not appear in the prior Bankruptcy Act in the provisions dealing with discharge, provability or allowability. "Fine" has a well recognized criminal connotation. Nor is it the only term found in § 523(a) with a clear criminal connotation. Section 523(a)(4) also excepts from discharge "debts" for "embezzlement" or "larceny."

The exception from discharge of obligations normally associated with criminal proceedings demonstrates that Congress contemplated that they were debts under 11 U.S.C. § 101(4), (11). If such obligations were not debts, there would be no need to except them from discharge since only debts can be discharged. *Kelly*, 479 U.S. at 58 (Marshall, J., dissenting); *In re Erickson*, 104 B.R. 364, 367 (Bankr. D. Colo. 1989).

2. In Other Legislation, Congress Has Recognized That Criminal Monetary Obligations Can Be Subject To Discharge In Bankruptcy

The conclusion that criminal monetary obligations are debts that may be affected by a bankruptcy discharge is further buttressed by Congress' more recent enactment of 18 U.S.C. § 3613(f) in 1984.

Subchapter C of chapter 227 of the federal Crimes Code authorizes imposition of a fine as a sentence for a defendant

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[15] *See* former 18 U.S.C. §§ 3611 *et seq.* In 1984, Congress modified the title heading of chapter 229, shifted several of its previous provisions to chapter 232 and added several new statutory sections. *See* Pub. L. 98-473, title II, C. II, § 212(a) 98 Stat. 1987.

found guilty of a federal criminal offense. *See* 18 U.S.C. § 3551(b); *id.* § 3571—§ 3573. Subchapter B of chapter 229 provides for the collection of unpaid fines and various remedies if a defendant fails to pay. 18 U.S.C. §§ 3611 *et seq.* As part of subchapter B, § 3613(f) explicitly states: "[n]o discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine." 18 U.S.C. § 3613(f). The enactment of this express exception to discharge for federal criminal fines would have been completely unnecessary unless such obligations were debts subject to discharge in at least some bankruptcy cases.

Section 3613(f) also demonstrates that when Congress meant to except criminal monetary penalties from bankruptcy discharge, it knew how to express that intent. Because it did so only for federal criminal fines, when it could have done so for all fines, it may reasonably be presumed that Congress did not intend to except non-federal fines from discharge.

3. Section 523(a)(7) Represents Congress' Codification Of The Pre-Code Judicially Created Exception From Discharge Of Monetary Obligations Arising Out Of Criminal Proceedings Which Was Not Carried Over To Chapter 13 Discharges Granted Pursuant To § 1328(a)

As the Court recognized in *Kelly*, it is instructive to examine how penalties and forfeitures were treated under the Bankruptcy Act. Under § 57(j) of the Act, 30 Stat. 561, penalties and forfeitures owed to governmental entities were not "allowable" and such entities could not share in the distribution of the estate. Section 63 of the Act, 30 Stat. 562, established the separate concept of "provable" debts. The Act further provided in § 17, 30 Stat. 550, that only provable debts could be discharged. The relationship of allowability, provability and dischargeability was well summarized in the leading bankruptcy treatise:

> Debts of the types specified in § 63 may be proved. They also *may* be allowed. But whether a debt so proved will

> actually be allowed is a distinct issue, and one that depends not only on provability. Allowance of a claim is determined by the court on the merits as a judicial act . . . . The court may disallow a claim because it does not constitute a debt provable under § 63, or because . . . [inter alia] the claim is legally invalid . . . . The infinite variety of reasons for which a claim may be disallowed explains why a disallowed claim and a nonprovable debt are not identical things, and why *a creditor whose debt is disallowed is not necessarily in the position of a creditor having a nonprovable debt and therefore unaffected by the bankrupt's discharge.*

3A *Collier on Bankruptcy* ¶63.05, at 1775-76 (14th ed. 1975) (first emphasis in original, second emphasis supplied) (*quoted in In re Steckler*, 195 F. Supp. 879 (S.D. Ind. 1961)).

Because § 17 contained no express exception for discharge of criminal monetary penalties based upon a court judgment, and restitution appeared to satisfy the elements of provability under § 63, the "most natural construction"[16] of the Act would have been to hold penalties provable and dischargeable but not allowable. The consequences of such a construction would have been to hold criminal monetary penalties owed to governmental entities dischargeable without permitting such creditors to share in the distribution of the estate. This absurd and obviously unintended result was avoided under the Act by the development of a judicial exception to dischargeability of criminal monetary penalties. In effect, the courts held that because such obligations, for policy reasons, should not be dischargeable, they must also be held non-provable.[17]

It is significant that judicial exception to dischargeability was not applied only to *criminal* monetary penalties. It applied with equal force where penalties arising in civil proceedings

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[16] *Kelly*, 479 U.S. at 44.

[17] Indeed, as one court stated: "Since . . . true penalties . . . are clearly not dischargeable, it follows that they are not provable." *Sherwood* v. *United States*, 228 F. Supp. 247, 250 (E.D. N.Y. 1964).

had been assessed against the bankrupt.[18] The courts did not distinguish between the two types of penalties.

It is this background against which the fundamental modification of the concept of debt rendered by the Bankruptcy Code and its ramifications on dischargeability must be analyzed. By abolishing the concept of provability in the Bankruptcy Code and expanding the scope of "claim" and "debt" to the fullest, Congress also eliminated the conceptual basis employed under prior law for determining the dischargeability of both civil and criminal penalties. It therefore became necessary to explicitly provide, one way or another, for civil and criminal penalties in § 523, the Code's general dischargeability provision.

In short, the substantial textual changes Congress made in 1978 to the bankruptcy provisions governing the scope of the term "debt" and the scope of the bankruptcy discharge, when viewed against the relationship of the concepts under prior law, establish that § 523(a)(7) represents Congress' codification of the established judicial exception to discharge for all fines and

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[18] *United States* v. *RePuss*, 688 F.2d 154, 157-58 (2d Cir. 1982) (civil penalties under federal False Claims Act not provable or dischargeable); *In re Abramson*, 210 F. 878 (2d Cir. 1914) (civil penalties under state Agricultural Law not dischargeable or provable); *Custom Wood Prods., Inc.* v. *United States*, 338 F. Supp. 337, 339-40 (W.D. Mich. 1971) (tax penalties "are not provable debts . . . and thus not dischargeable"); *In re Steckler*, 195 F. Supp. 879 (S.D. Ind. 1961) (tax penalties not provable or dischargeable); *In re Di Vincenzo*, 1 B.R. 528, 531-32 (Bankr. S.D. N.Y. 1979) (tax penalties not provable or dischargeable). *See also In re Messenger's Merchants Lunch Rooms, Inc.*, 85 F.2d 1002, 1005 (7th Cir. 1936) (stating that tax penalties are not provable); *Sherwood* v. *United States*, 228 F. Supp. 247, 249-50 (E.D. N.Y. 1964) (stating that penalties and forfeitures are not provable or dischargeable); *People ex rel. Otterstedt* v. *Sheriff of Kings County*, 206 F. 566 (E.D. N.Y. 1913) (civil contempt fine not dischargeable).

penalties, both civil and criminal.[19] Indeed, in *Kelly*, the Court specifically stated that § 523(a)(7) "protects traditional criminal fines; *it codifies the judicially created exception to discharge for fines.*" *Kelly*, 479 U.S. at 51 (emphasis added). There is nothing in the text of this provision or the sparse legislative history to suggest that Congress intended to differentiate between civil and criminal fines and penalties when it carried the pre-Code dischargeability exception for penalties into § 523(a)(7).[20] By codifying prior law in § 523(a)(7), which is incorporated by reference in some other Code provisions but not in § 1328(a), Congress necessarily expressed its intent to

[19] Amicus Washington Legal Foundation, at p. 10 of its brief, inaccurately states that respondents concede that two cases, *United States* v. *Alexander*, 743 F.2d 472 (7th Cir. 1984), and *United States* v. *Carson*, 669 F.2d 216 (5th Cir. 1982), were correctly decided. No such concession was made because the cases are distinguishable. The defendant in *Carson* received a discharge in bankruptcy under the Bankruptcy Act; the defendant in *Alexander* received a chapter 7 discharge under the Bankruptcy Code. Neither case directly addressed the question of whether restitution was a debt. Instead, the courts' narrow holdings that federal judges were not precluded from ordering debtors to pay restitution in subsequent criminal proceedings for fraud presaged this Court's ruling in *Kelly*. To the extent these cases can be read to conclude that restitution is not a debt, they are incorrect. But since neither involved a chapter 13 bankruptcy discharge, they are not relevant here.

[20] Petitioners argue that the legislative history suggests that Congress was referring only to civil tax penalties in § 523(a)(7). Petitioners' Brief at 51. However, the Senate and House Reports do not support this conclusion. The Senate Report states that § 523(a)(7) "makes non-dischargeable certain liabilities for penalties *including* tax penalties . . . ." Senate Report at 79 (emphasis added). Petitioners' argument is also belied by the language of § 523(a)(7) which can only be read as viewing tax penalties as a subset of the larger categories of "fine, penalty, or forfeiture."

permit the discharge of fines and penalties in at least some chapter 13 cases.[21]

D. Congress' Intent To Classify Restitution As A Debt Is Expressed In Other Bankruptcy Code Provisions

The intent of Congress that restitution be classified as a claim in bankruptcy is demonstrated by other provisions of the Bankruptcy Code, which are fully consistent with that conclusion as well as with Congress' expressed preference for restitution to victims over punitive fines.

1. Section 726

The distribution of property of the debtor's estate is addressed by 11 U.S.C. § 726. That section states expansively, in pertinent part, that holders of claims for "*any* fine, penalty, or forfeiture" as well as punitive damages, are entitled to receive distributions, assuming the existence of sufficient property in the estate. 11 U.S.C. § 726(a)(4) (emphasis added). Thus, § 726(a)(4) is an explicit recognition that restitution is a debt. *Kelly*, 479 U.S. at 58 (Marshall, J., dissenting).

The text of § 726 also refutes the argument that Congress meant the terms fines, penalties and forfeitures to refer only to civil obligations. Section 726 distinguishes fines, penalties and forfeitures from civil penalties such as "multiple, exemplary or punitive damages." This distinction strongly suggests that Congress meant the terms fines, penalties and forfeitures to be given their commonly understood criminal connotation.

It is also not anomalous for fines and penalties to be given a lower priority than other claims for the simple reason that,

[21] Part II, *infra*, discusses how the conclusion that fines may be discharged in some chapter 13 cases is wholly harmonious with fundamental bankruptcy policies as well as particular policies embodied in chapter 13.

under this Court's decision in *Kelly*, they are nondischargeable in chapter 7 (as well as in chapter 12, many chapter 11 cases, and chapter 13 hardship discharge cases). The holder of a restitution claim in a chapter 7 case has not only the right to share in the bankruptcy estate but also the right to pursue the debtor's income and assets acquired after the bankruptcy filing.

Indeed, including criminal monetary claims in bankruptcy is necessary to prevent an undesirable clash between federal and state courts over the property of the bankruptcy estate. There can be little doubt that the federal district court, normally acting through the bankruptcy court, has exclusive jurisdiction over the property of the debtor as of the filing of the bankruptcy petition. 28 U.S.C. § 1334(d); 11 U.S.C. § 541(a). To the extent a state court fine or restitution order contemplated the debtor liquidating that same property in order to comply, attempts to enforce that payment outside of the bankruptcy system would create an inevitable confrontation between the state court and the federal court over the disposition of the property.

Absent a lien securing the state criminal court's fine or restitution order, any attempt by the state to look to property of the bankruptcy estate for payment outside of bankruptcy would place it squarely in conflict not only with the functioning of the bankruptcy system but also with the interests of other creditors. These other creditors might well include other victims of crimes who had not obtained restitution orders. Such a result would undermine the fundamental bankruptcy policy of treating like creditors equally.

The conflict with bankruptcy policy would be exacerbated if the state sought, after the bankruptcy filing, to enforce a purely penal fine or forfeiture, rather than a restitution order. In such a case, the state would be seeking payment from assets that would otherwise go to those with damage claims against the debtor, including crime victims. Allowing such efforts would directly contravene the Congressional policy of providing restitution to crime victims rather than fines to the government when there are insufficient funds available to pay both. *See* S. Rep. No. 532, 97th Cong., 2d Sess. 30 (1982). It would also greatly impair the pervasive federal bankruptcy jurisdiction over the debtor's property contemplated not only by the Bankruptcy Code, but also by the Constitution.

Moreover, far from creating an anomalous result, as suggested by the Solicitor General, this common sense reading of § 726 as including criminal monetary obligations works to the benefit of victims entitled to restitution, as well as others whom the debtor may have harmed. Such persons, by virtue of the damages caused them by the debtor, would also normally be holders of unsecured claims[22] and thereby be entitled to share in the property of the debtor distributed in the bankruptcy. Unsecured claims for damages are given a higher priority under § 726(a)(2) than a government's claim for a purely penal fine, which may only be paid under § 726(a)(4) after all general unsecured claims have been paid in full. This ranking, which prevents government fines from preempting or diluting the claims of victims and other creditors, is completely consistent with Congressional policy, expressed in recent legislation, that payment to victims of crimes is preferred over fines where the defendant does not have the ability to pay both. 18 U.S.C. § 3572(b). It is also a traditional principle in bankruptcy law. *See Simonson* v. *Granquist*, 369 U.S. 38, 41 (1962) (enforcement of monetary penalties against the debtor is disfavored because it serves to "punish . . . entirely innocent creditors").

Further, in a chapter 7 case where the debtor is a corporation or an individual with substantial property but little or no income, if the crime victim does not file a claim, payment of the restitution order under § 726(a)(4) may be the only possible way for the victim to recover.[23]

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[22] A victim could also be the holder of a secured claim if a judgment and execution lien had been obtained prior to bankruptcy.

[23] Unsecured creditors may receive distributions in a chapter 7 case only if they file claims. 11 U.S.C. § 726(a)(2).

2. Section 362(b)

In light of the broad language Congress employed when it defined the term "claim" in § 101(4), it is instructive that elsewhere in the Code, Congress specifically referred to criminal proceedings when it wished to insulate such proceedings from the reach of the Code.

Section 362 (b) of the Code excepts from the broad reach of the automatic stay,[24] "the commencement or continuation of a criminal action or proceeding against the debtor." 11 U.S.C. § 362(b). As the court of appeals stated, "[n]owhere in the discussion of either claim or debt, however, does Congress express a similar intention to restrict those definitions to exclude obligations arising from criminal penalties." *In re Johnson-Allen*, 871 F.2d at 427. The very existence of § 362(b) illustrates again that Congress knew how to express its intent to except criminal proceedings from the bankruptcy process when it wished to do so. *Accord* 18 U.S.C. § 3613(f) (excepting federal criminal fines from all types of bankruptcy discharge). *See also* Part I C 1, *supra*.

Petitioners' reliance on § 362(b) in support of their position is misplaced. The existence of an exception to the automatic stay for a particular type of obligation simply does not bear on whether that obligation is a bankruptcy "claim." The concepts are different. For example, alimony, maintenance and support obligations are excepted from the automatic stay to a significant degree. 11 U.S.C. § 362(b)(2). Yet, it is indisputable that such obligations are bankruptcy claims.

To the extent § 362(b) is relevant, it illustrates that Congress carefully distinguished between permitting certain non-

[24] 11 U.S.C. § 362(a) of the Code automatically stays, upon the filing of a bankruptcy petition, a broad range of formal legal actions as well as informal action directed against the debtor or property of the bankruptcy estate. *See* 2 *Collier on Bankruptcy* ¶ 362.04 (15th ed. 1989).

bankruptcy proceedings or actions to take place after a bankruptcy case has been filed and the enforcement of claims or judgments against the debtor or property of the estate. Congress drafted § 362(b) in such a way as to protect the estate's assets for the benefit of all creditors and to minimize the potential conflict between bankruptcy and nonbankruptcy courts over the administration of the debtor's assets.

This policy is expressed in the language of § 362(b)(1) which refers to the "commencement or continuation" of a criminal proceeding but not to the "recovery of a claim" or the "enforcement of a judgment." *See also* 11 U.S.C. § 362(b)(2) (permitting holders of alimony, maintenance or support claims to proceed only against property that is not property of the estate).

The same distinction is made in § 362(b)(4) and (5). Section 362(b)(4) excepts from the automatic stay, § 362(a)(1), "the commencement or continuation" of governmental actions to enforce police or regulatory power. Section 362(b)(5) separately excepts from the automatic stay, § 362(a)(2), the "enforcement" of a judgment obtained in an action to enforce governmental, police or regulatory power. Significantly, even where Congress excepted enforcement of police or regulatory judgments from the automatic stay, it prohibited the government from enforcing a "money judgment." 11 U.S.C. § 362(b)(5). The legislative history of § 362(b)(5) explains the reason for this prohibition:

> Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors.

Senate Report at 52; House Report at 343.

In sum, the very existence of § 362(b)(1) as an express exception to the automatic stay as well as the distinction Congress consistently drew between commencing or continuing legal

proceedings on the one hand, and recovering a claim or enforcing a judgment on the other hand, demonstrate that Congress contemplated that restitution obligations are debts cognizable in bankruptcy.

II. THE CLASSIFICATION OF A CRIMINAL RESTITUTION OBLIGATION AS A DEBT UNDER THE BANKRUPTCY CODE IS WHOLLY HARMONIOUS WITH THE PURPOSES AND POLICIES OF CHAPTER 13

A. Introduction

The two principal purposes of bankruptcy are to provide equity among creditors and a fresh start for the debtor. The fresh start purpose is designed to allow individuals who have become mired in debt to free themselves from that burden and engage in newly productive lives unhampered by the pressure and discouragement of preexisting debt. *E.g.*, *Local Loan Co.* v. *Hunt*, 292 U.S. 234, 244 (1934). The goal of equity among creditors is achieved by the fair distribution of the debtor's assets according to established rules, set forth in the Code, which guarantee similar treatment to similarly situated creditors. *See*, *e.g.*, House Report at 177-78.

In substantially revising chapter 13 of the Bankruptcy Code in 1978, Congress clearly expressed its intent to make consumer debtor rehabilitation payment plans an attractive alternative to the straight liquidation of chapter 7 and to address the problems which had caused former chapter XIII to be underutilized under the Act. *See* House Report at 116-18. As in the other Code chapters, under chapter 13, Congress sought to accommodate fairly both debtors and creditors[25] and to achieve

[25] The House Report states:

> The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his nonexempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. Chapter 13 also protects a debtor's credit standing far better than a straight bankruptcy, because he is viewed by the credit industry as a better risk. In addition, it satisfies many debtors' desire to avoid the stigma attached to straight bankruptcy and to retain the pride attendant on being able to meet one's obligations. The benefit to creditors is self-evident: their losses will be significantly less than if their debtors opt for straight bankruptcy.

House Report at 118. *See also* 5 *Collier on Bankruptcy* ¶ 1300.02 (15th ed. 1989).

a balance of the competing interests which arise in bankruptcy cases. The applicable Code provisions accord significant rights to both debtors and creditors. The creation of such a delicately balanced system obviates the need for the expansive holding urged by petitioners—a holding that would exclude entirely one class of monetary obligations from the comprehensive system of administering debts found in chapter 13.

When this system is examined more closely, it is apparent that chapter 13 either accommodates or rejects the various policy concerns articulated by petitioners and their supporting amici. Further, it also becomes apparent that the spectre of routine bankruptcy discharge of restitution obligations posited by petitioners and amici is unfounded. What chapter 13 provides is the opportunity, in circumscribed, appropriate cases, for an individual to propose a financial rehabilitation plan which will provide for payment in full or in part of a restitution obligation, according to the debtor's ability to pay.

B. Placing Restitution Outside The Bankruptcy System Is An Overbroad, Unnecessary Response To A Perceived Danger Of Abuse Of The Bankruptcy Code And Would Frustrate Fundamental Bankruptcy Policy

The detailed system for adjustment of debts established by Congress in chapter 13 is neither one-sided in favor of debtors nor so loosely drafted as to permit individuals, such as those who have looted the nation's savings and loan system or who have committed other wrongful acts which give rise to substan-

tial damage awards, to take advantage of its rehabilitative provisions. Individuals who owe unsecured claims in excess of $100,000 or secured debts in excess of $350,000 may not be debtors under chapter 13. 11 U.S.C. § 109(e).[26] Thus, Congress limited access to the expansive § 1328(a) discharge, at least in part, by a bright-line rule based on the total sum of the debtor's obligations.

The fear expressed by the Solicitor General that a corporation may use chapter 11 in an effort to escape its restitution debts is overstated. If a corporation lacks unencumbered assets out of which claims may be paid and cannot effectively reorganize to generate income, a restitution claim will not be paid regardless of whether a bankruptcy petition is filed. Whether in or out of bankruptcy, once such a corporation ceases doing business and its encumbered property is used for satisfaction of secured debts, all that will remain is a corporate shell with no assets for distribution to any unsecured creditors. If the corporation liquidates under chapter 11, it may not even receive a discharge. *See* 11 U.S.C. § 1141(d)(3).

Moreover, in any chapter 11 case in which a corporate debtor seeks to reorganize, its chapter 11 plan is subject to numerous requirements that effectively limit a debtor's ability to avoid restitution obligations. Included among those requirements are the requirements that the plan be proposed in "good faith," *see* n.30, *infra* and accompanying text, and be accepted, in most instances, by a vote of the holders of a class of claims impaired by the plan. *See* 11 U.S.C. § 1129(a)(3), (8)(B); *id.* § 1126.

Once a qualified debtor files a petition under chapter 13, creditors have substantial rights, including: (1) the right of secured creditors to demand adequate protection of their security interests while the bankruptcy case is pending and to

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[26] If such an individual qualifies to file a chapter 11 bankruptcy petition, the debts falling within the scope of § 523(a) cannot be discharged in such a case. 11 U.S.C. § 1141(d)(2).

demand payments equalling the present value of the claims under any plan proposing to satisfy such claims in installments;[27] (2) the right of unsecured creditors to demand payments having a present value equal to the distribution they would have been paid if the debtor liquidated under chapter 7;[28] and (3) the right of unsecured creditors to insist that a debtor devote all projected "disposable income" for three years toward payments to be made under the chapter 13 plan if the plan does not propose to pay their claims in full.[29]

These rights accorded to creditors under the Bankruptcy Code guarantee that a debtor with sufficient income or property to pay a restitution obligation through a chapter 13 plan will do so. Chapter 13 provides no haven for an individual to escape payment of obligations that he can afford to pay.

Perhaps the most important protection against abuse of the Bankruptcy Code is the bankruptcy court's power to deny confirmation of a chapter 13 plan which has not been proposed "in good faith." 11 U.S.C. § 1325(a)(3). The courts of appeals have outlined a list of factors which bankruptcy courts should consider in determining whether a chapter 13 plan has been proposed in good faith.[30] One factor, though by no means an

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[27] 11 U.S.C. § 362(d)(1); *id.* § 1325(a)(5).

[28] 11 U.S.C. § 1325(a)(4).

[29] 11 U.S.C. § 1325(b). As the bankruptcy judge observed in this case:

> If restitution is not a debt governed by a chapter 13 plan, then either the debtor cannot comply with § 1325(b), or the definition of disposable income must be adjusted. The former result would defeat the congressional goal of encouraging the use of chapter 13; the latter result would defeat the equality of treatment principle focused in 11 U.S.C. § 1322(a)(3), for the prepetition victim would receive greater payments than other unsecured creditors.

In re Davenport, 83 B.R. at 315.

[30] *E.g.*, *In re LeMaire*, 883 F.2d 1373 (8th Cir. 1989); *In re Smith*, 848 F.2d 813 (7th Cir. 1988).

exclusive one, is consideration of the existence and treatment of debts which would be nondischargeable under chapter 7. Courts have not hesitated to deny confirmation of plans which did not satisfy the good faith requirement.[31]

Any creditor who believes, for any reason, that a chapter 13 plan should not be confirmed may file an objection to confirmation. *See* Bankr. Rule 3020(b). In this case, petitioners did not avail themselves of any of the rights accorded creditors under chapter 13 and filed no objection to confirmation of the debtors' proposed chapter 13 plan.

In short, the comprehensive system enacted by Congress already resolves the competing interests which arise when a debtor with § 523(a) obligations seeks chapter 13 relief. The broad holding urged by petitioners not only conflicts with the plain language of both § 101(4), (11) and § 523(a)(7), but also undermines fundamental bankruptcy policies. By arguing that restitution is not even a debt under the Code, petitioners seek to place their claim completely outside the bankruptcy system and to receive more favorable treatment than that to be accorded to all of the other creditors of a chapter 13 debtor—including other creditors holding § 523(a) claims.

In effect, petitioners seek super-priority status, to be paid in full before all other monetary obligations of the debtor. Had Congress intended such a result, it would have expressed that intent directly, either in 11 U.S.C. § 1322(a)(2), which requires that certain obligations be paid in full through any chapter 13 plan, or elsewhere. It makes much more sense to construe the Code to provide for the adjustment of all of the debtor's obligations in the bankruptcy court—a single forum which can

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[31] *E.g.*, *In re Chase*, 43 B.R. 739 (D. Md. 1984); *In re Kourtakis*, 75 B.R. 183 (Bankr. E.D. Mich. 1987); *In re Todd*, 65 B.R. 249 (Bankr. N.D. Ill. 1986); *In re Wall*, 52 B.R. 613 (Bankr. M.D. Fla. 1985); *In re Boyd*, 57 B.R. 410 (Bankr. N.D. Ill. 1983); *In re Weyand*, 33 B.R. 553 (Bankr. D. Colo. 1983); *In re Terry*, 9 B.R. 314 (Bankr. D. Colo. 1981); *In re Leal*, 7 B.R. 245 (Bankr. D. Colo. 1980).

coherently, efficiently and equitably administer the debtor's financial affairs without competition or conflict with other courts. *See* House Report at 43-48.

Finally, the result urged by petitioners and supporting amici would also totally exclude from chapter 13 relief debtors who otherwise could, under the protection of the bankruptcy court, successfully adjust all of their debts, including § 523(a) obligations. For example, an individual may be able to propose a chapter 13 plan in which he pays his unsecured debts, including a restitution claim, in full (albeit with lower monthly payments and over a longer period of time than set by the restitution order), and at the same time cures a delinquency on a home mortgage or car loan. Placing restitution outside the bankruptcy process could effectively deny such an individual the opportunity to formulate a feasible chapter 13 plan. Without chapter 13 relief, the individual may lose his home and incur increased shelter costs (which might render him financially unable to pay the restitution obligation), or may lose a car needed to get to and from work (which could result in the loss of the very employment income needed to pay the restitution). The end result could well be that neither the restitution order nor the other unsecured creditors would be paid. *See generally In re Otero*, 48 B.R. 704 (Bankr. E.D. Va. 1985) (discussing negative consequences to all creditors from denial of chapter 13 relief to debtor with substantial prepetition debt arising from his wrongdoing).

The foregoing example illustrates that totally barring debtors from proposing a feasible chapter 13 plan can, in some cases, only result in harming both the restitution claimants and the other creditors. At best, the result urged by petitioners will benefit restitution claimants at the expense of other creditors, including other creditors holding claims falling under § 523(a). This is neither consistent with fundamental bankruptcy policy nor necessary to prevent abuse of the bankruptcy laws. Accordingly, the Court should reject the overbroad holding advocated by petitioners and amici and instead hold that

restitution is a debt which can be paid, or in some appropriate cases, partially paid and discharged in chapter 13.

C. The Broad Chapter 13 Discharge Under § 1328(a) Implements The Equal Treatment Of Creditors And Fresh Start Principles That Are Fundamental To The Bankruptcy Code

In order to make chapter 13 more accessible and beneficial to debtors, Congress provided debtors with various rights, many of which did not exist under prior law. Under current chapter 13: (1) eligibility is expanded from wage earners to individuals "with regular income";[32] (2) the debtor is afforded adequate property exemptions to foster the rehabilitation and financial fresh start;[33] (3) the debtor is provided with the power to avoid certain prepetition and postpetition liens and property transfers;[34] (4) the debtor may formulate a plan in which defaults on secured debts may be cured or secured obligations are modified;[35] and (5) the debtor's plan must be confirmed without creditor voting or approval if it meets explicit statutory standards.[36]

In addition, the scope of the discharge under § 1328(a), when a debtor completes his plan payments, is broader than that provided under other Code provisions. In chapter 7, chapter 12 and in many chapter 11 and chapter 13 cases, various types of obligations arising from wrongful prepetition conduct by the debtor are nondischargeable due to policy judgments made by Congress, including debts arising from fraud, embezzlement, larceny, willful and malicious injury and drunk driving. 11 U.S.C. § 523(a). It is indisputable that such debts may be

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[32] 11 U.S.C. § 109(e).

[33] 11 U.S.C. § 522(b), (d).

[34] 11 U.S.C. § 522(f), (g), (h). *See also* 11 U.S.C. §§ 544, 545, 547, 548, 549.

[35] 11 U.S.C. § 1322(b).

[36] 11 U.S.C. § 1325(a).

discharged under § 1328(a). *Compare* 11 U.S.C. § 523(a)(2), (4), (6), (9) *with id.* § 1328(a). *See also* 5 *Collier on Bankruptcy* § 1328.01[1][c] (15th ed. 1989). This is a clearly intended, substantial change from prior law.[37]

Thus, Congress was well aware that debts about which our society makes strong, negative moral judgments are subject to discharge under § 1328(a). The plain language and structure of the Code provide no basis to distinguish § 523(a)(7) debts from other § 523(a) debts for purposes of the § 1328(a) discharge.[38]

From a policy perspective, application of the broad chapter 13 discharge implements both of the fundamental purposes of bankruptcy—equal treatment of creditors and a fresh start for debtors. A chapter 13 debtor who makes his best effort to repay his creditors by submitting all of his disposable income to the trustee for a three year period is rewarded by the broader discharge provided by § 1328(a).[39] *See, e.g., In re Rimgale*, 669 F.2d 426, 428 (7th Cir. 1982). This, in return, enhances the possibility that creditors will receive satisfaction of their claims, in whole or in part.

To exclude restitution obligations from the bankruptcy process would be to prefer creditors holding § 523(a)(7) claims over all other creditors, including creditors holding other § 523(a) claims and perhaps other victims of crimes, thus undermining the equal treatment of creditors principle. Such a result is particularly inappropriate in light of the long-standing bank-

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[37] Under § 660 of the Bankruptcy Act, 52 Stat. 935, *as amended*, 66 Stat. 437, a debt that was nondischargeable under § 17 could not be discharged under chapter XIII without the agreement of the creditor holding the claim.

[38] The one exception, of course, is a § 523(a)(5) debt for alimony or support which is expressly excluded from a chapter 13 discharge. 11 U.S.C. § 1328(c)(2).

[39] By comparison, a chapter 13 debtor who does not complete performance of his plan obligations can receive, at best, a discharge no broader than that provided by chapter 7. 11 U.S.C. § 1328(b).

ruptcy policy against enforcing penalties against the debtor at the expense of the other innocent creditors. *See, e.g., Simonson*, 369 U.S. at 41.

III. THE CONCLUSION THAT CRIMINAL RESTITUTION IS A DEBT DOES NOT UNDULY INTERFERE WITH STATE CRIMINAL PROSECUTIONS

A. The Federalism Concerns Of *Younger* v. *Harris* Are Not Significantly Implicated

Throughout this case, petitioners have sought to portray a chapter 13 discharge as an impermissible intrusion on state interests. Such a view is unfounded. Petitioners greatly exaggerate the effect of declaring criminal restitution to be a debt. Moreover, to the extent there is tension between federal bankruptcy policy and state interests, that is simply an example of the balance between federalism and supremacy.

Petitioners rely heavily on this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971). In *Younger*, the Court held that federal injunctive relief against state criminal prosecutions should be granted only in extraordinary circumstances where the danger of irreparable loss is both great and immediate and where a statute on its face abridges first amendment rights or where a criminal prosecution is conducted in bad faith or for harassment. *Id.* at 53-54.[40]

The same court from which petitioners appeal here has shown its concern for federalism in bankruptcy cases. In *In re*

[40] While *Younger* restricts the equitable jurisdiction of federal courts, its applicability is limited in the bankruptcy context. The discharge provision of the Bankruptcy Code, 11 U.S.C. § 524(a)(2), is a *statutory* injunction, an injunction imposed by Congress, not by a court exercising its equitable powers. For statutory injunctions to have any meaning, courts must enforce them even in circumstances where courts themselves would not grant equitable relief. *In re Chicago, Milwaukee, St. Paul & Pacific R.R.*, 738 F.2d 209, 212-13 (7th Cir. 1984).

Davis, 691 F.2d 176 (3d Cir. 1982), the court of appeals affirmed the lower court decision refusing to enjoin a Delaware criminal bad check proceeding where it was alleged that the purpose of the proceeding was to collect a dischargeable debt. The court declined to presume that Delaware would disregard the debtors' federal law defense to the prosecution. *Davis*, 691 F.2d at 178.

The Davenports do not seek to enjoin a state criminal proceeding; they recognize that such a proceeding may continue. The federalism concerns articulated in *Younger* are not significantly implicated here. As far as debtors are concerned, DPW or the Probation Department may institute revocation of probation proceedings at any time. Debtors instituted this proceeding primarily[41] to obtain a declaration of the extent of their rights to a discharge under chapter 13.

Petitioners' claims of interference in state court proceedings are unduly alarmist. Because of *Bearden* and similar Pennsylvania law,[42] the state court would not afford appreciably different treatment to the indigent defendant who was unable to fulfill the restitution condition of probation than would be afforded the indigent defendant who has filed bankruptcy under chapter 13. In neither case could the defendant be forced to pay that which he does not have. But, in each situation, the state court still has an array of alternative resolutions available. Conditions of probation could be altered to require some type of community service, or enlistment in a work program or other activity that would result in compensation to the vic-

[41] Debtors' Complaint to Determine Dischargeability of Debt did request injunctive relief. J.A. 31a. Debtors never pressed that request and, in fact, voluntarily appeared, after the bankruptcy trial, at the state court probation revocation hearing. 3d Cir. App. 162a - 179a.

[42] *E.g., Commonwealth ex rel. Parrish* v. *Cliff*, 451 Pa. 427, 304 A.2d 158 (1973).

tim.[43] The state court would be free, without interference from the bankruptcy court, to impose any remedy available other than compelling a debtor to pay a discharged debt.

Indeed, as occurred in this case, when the Davenports defaulted on their restitution payments, the Probation Department initiated a revocation hearing. The debtors voluntarily appeared and testified to their inability to pay restitution. The state court simply concluded that there was no willful failure to pay and denied the motion to revoke probation. 3d Cir. App. 178a. The outcome of the revocation hearing was therefore the same as if no bankruptcy had ever been filed. Thus, petitioners' claim that a bankruptcy discharge would unduly hamper state court proceedings is greatly exaggerated. The bankruptcy courts which have held restitution to be a debt have limited only the collection of restitution, leaving the state otherwise free to prosecute the criminal conduct underlying the debt.[44]

Petitioners also argue that discharging restitution would detract from the sentencing judge's flexibility in fashioning appropriate criminal penalties. This argument may have superficial appeal but it overlooks several important realities. First, the applicable statute in this case, Pa. Stat. Ann. tit. 62, § 481(c) (Purdon Supp. 1989), mandated the entry of a restitution order; no flexibility existed in the first place.[45] Second, to

[43] Some states specifically provide for work programs in lieu of monetary restitution. Del. Code Ann. tit. 11, § 4106(b) (1987); Ky. Rev. Stat. Ann. § 533.030(3) (Michie/Bobbs-Merrill Supp. 1988).

[44] *E.g.*, *In re Brown*, 51 B.R. 51 (Bankr. E.D. Ark. 1985); *In re Farrell*, 43 B.R. 115 (M.D. Tenn. 1984); *In re Holder*, 26 B.R. 789, 793 (Bankr. M.D. Tenn. 1982); *Lawson* v. *Boczonadi*, 22 B.R. 100, 104 (Bankr. S.D. Ohio 1982); *Johnson* v. *Lindsey*, 16 B.R. 211 (Bankr. M.D. Fla. 1981). One federal district court reversed a bankruptcy court injunction against a bad-check prosecution but saw some merit in injunctions limited to restitution sentences themselves. *In re Klawson*, 50 B.R. 776, 779 (N.D. Ind. 1985).

[45] *E.g.*, Ariz. Rev. Stat. Ann. § 13-901(A) (1989); Ark. Code Ann. § 16-90-303 (1987); Colo. Rev. Stat. § 16-11-204.5(1) (West Supp. 1989); Iowa Code Ann. § 910.2 (West Supp. 1989); Tenn. Code Ann. § 40-20-116 (1982).

the extent a defendant is indigent, restitution could not be compelled anyway. *Bearden* v. *Georgia*, 461 U.S. 660 (1983). Third, as discussed in Part II B, *supra*, not all criminal defendants could qualify for chapter 13 relief. Finally, to the limited extent a state court's sentencing prerogatives are reduced, that is a result of the choice made by Congress when it enacted the comprehensive bankruptcy system in 1978. *See* Part III C, *infra*.

B. The Provisions Of Chapter 13 Are In Harmony With The Purposes Of Restitution And Accord Due Respect To State Criminal Court Determinations

Petitioners also raise the spectre of massive interference with state court criminal sentences due to large numbers of chapter 13 cases filed to avoid criminal restitution. In fact, there would be no such interference because the principles of chapter 13 bankruptcy are basically consistent with those underlying criminal restitution statutes. As petitioners and amici point out, both state and federal restitution statutes serve the important goal of providing payment to victims of the debtor's acts. Such statutes also are premised upon the principle that defendants may only be ordered to remit amounts within their ability to pay. Chapter 13 has the same goal—to provide for payment to those who have suffered damages due to the debtor's acts, consistent with the debtor's ability to pay.

Section 1325(b) of the Bankruptcy Code, 11 U.S.C. § 1325(b),[46] provides that either the chapter 13 trustee or any

[46] 11 U.S.C. § 1325(b) states as follows:

> (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposal income to be received in the three-year period beginning on the date that the first payment is due under the plan will be

holder of an unsecured claim may object to and prevent confirmation of any plan that does not either pay unsecured debts in full or devote all of the debtor's disposable income over three years to payment of debts under the plan. "Disposable income" is defined by that same section to mean all income not reasonably necessary for the maintenance or support of the debtor or a dependent of the debtor. 11 U.S.C. § 1325(b)(2)(A).

In any chapter 13 case involving a criminal restitution debt, if the debtor does not propose a plan meeting this "ability-to-pay test," the chapter 13 trustee, or the prosecutor, or the victim (who is also the holder of an unsecured claim) may file an objection to prevent confirmation of the plan and the ultimate discharge of the debt.[47] Such objections are routinely filed by chapter 13 trustees throughout the country, who view such filings as an important aspect of their duties.

In determining such objections, the federal bankruptcy court is bound by normal principles of collateral estoppel, just as it is bound with respect to other issues, such as dischargeability. *See, e.g., Klingman* v. *Levinson*, 831 F.2d 1292 (7th Cir. 1987); *In re Pitner*, 696 F.2d 447 (6th Cir. 1982). If the issue of ability to pay has been litigated in the state criminal proceeding, with consideration given to the debtor's obliga-

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applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended—

(A) for the maintenance or support of the debtor or a dependent of the debtor; and

(B) if the debtor is engaged in business, for the necessary payment of expenditures necessary for the continuation, preservation, and operation of such business.

[47] Neither the prosecutor, the Probation Department nor DPW bothered to file such an objection in this case.

tions to dependents as well as other creditors,[48] and if there has been no material change in circumstances,[49] the bankruptcy court is bound by the state court's determination of the debtor's ability to pay.

Since the bankruptcy court could not deviate from the determination of the state criminal court in such cases, the filing of a chapter 13 petition would offer no advantage to criminal defendants. Not only would they be required to continue payments consistent with their ability to pay, but also they would be required to meet all of their other obligations to creditors, plus pay a trustee's commission[50] (usually about 10%) on all payments through the plan, plus pay a filing fee and, normally, an attorney's fee for the bankruptcy filing. For this reason, it is not surprising that petitioners and amici have been unable to

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[48] Where the criminal restitution decision did not take into account the debtor's obligations to other creditors (who may include other crime victims or individuals with tort claims more sympathetic than the claims of welfare departments or holders of bad checks) the bankruptcy court cannot simply accept the state court's determination. It is essential that the bankruptcy court assure equitable treatment of all creditors, so that uneven distribution of the debtor's assets and income does not result from a race to the courthouse on the happenstance that one judge awarded restitution to one victim while a different judge did not award restitution to another.

[49] To the extent that circumstances have changed to render the debtor unable to pay all or part of the restitution obligation, petitioners themselves readily concede that a criminal court would not require payment. Petitioners' Brief at 29. A bankruptcy court, which regularly makes determinations of ability to pay, is certainly competent to determine whether such changes have occurred. And just as bankruptcy courts must respect state court determinations, there is no reason state criminal courts should not be able to respect determinations of federal bankruptcy courts in an area of overlapping responsibilities.

[50] *See* 28 U.S.C. § 586(e).

point to any perceptible increase in chapter 13 filings by criminal defendants subject to restitution orders in the Third Circuit since the decision of the court of appeals in this case. Combined with the bankruptcy court's ability to deny confirmation if a plan is not filed in good faith, the ability-to-pay test assures that chapter 13 will not become a vehicle for circumventing criminal restitution obligations that debtors can afford to pay. Indeed, chapter 13 assures that all those damaged by the debtor's acts will be treated on a basis that Congress determined to be fair and equitable.

C. The Balancing Of Bankruptcy Policy And The States' Interest In Collecting Restitution Must Be Resolved By Congress, Not The Court

To the extent that application of bankruptcy principles impacts on state court proceedings, that is a result intended by Congress. Petitioners argue that this result is prohibited by principles of federalism and comity. But the competing and countervailing principle is that embodied in the Supremacy Clause. United States Constitution, article VI, clause 2. This Court recently discussed supremacy:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. Determining whether it has exercised this power requires that we examine congressional intent. In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation leaving no room for the States to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.

Northwest Central Pipeline Corp. v. *State Corp. Comm'n.*, 109 S.Ct. 1262, 1273 (1989) (citations omitted).

Only Congress can dictate the scope of a discharge in federal bankruptcy cases, and only Congress has the constitutional power to provide for the discharge of certain debts and to except other debts from discharge in such cases. United States

Constitution, article I, section 8, clause 4; *Stellwagen* v. *Clum*, 245 U.S. 605 (1918).

Congress expressly provided for the discharge under § 1328(a) of all debts except those for alimony, maintenance and support and certain obligations of the type set forth in § 1322(b)(5). That provision unequivocally manifests the Congressional intent that a debtor in chapter 13 be afforded a broad discharge in order to encourage the debtor to file under chapter 13 rather than chapter 7, and then to complete payments under a plan. *See* 11 U.S.C. § 1328(a); 5 *Collier on Bankruptcy* § 1328.01[1][c].[51] To hold otherwise would permit a state statute to frustrate the full effectiveness of federal bankruptcy law. *Perez* v. *Campbell*, 402 U.S. 637, 653 (1971).

Permitting restitution creditors to ignore the bankruptcy process would encourage circumvention of the comprehensive system of uniform bankruptcy laws enacted by Congress. If restitution is held not to be a debt, one unfortunate consequence could be an increase in creditors' resort to the state criminal process to collect debts, raising the spectre of a potential return to the days of debtors' prison. *See* Kratsch and Young, *Criminal Prosecutions and Manipulative Restitution: The Use Of State Criminal Courts For Contravention Of Debtor Relief*, 1984 Ann. Surv. Bankr. L. 107. For example, some states require restitution if the debtor is convicted of passing bad checks.[52] Other states permit restitution in the sentencing court's discretion.[53] Still other states have imple-

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[51] This inescapable conclusion is further bolstered by the fact that if a debtor fails to complete payments, but obtains a "hardship" discharge under § 1328(b), restitution obligations are not discharged. 11 U.S.C. § 523(a).

[52] *E.g.*, Ga. Code Ann. § 16-9-20(b)(4) (1988 & Supp. 1989); Wash. Rev. Code Ann. § 9A.56.060(5) (1988).

[53] *E.g.*, Colo. Rev. Stat. § 18-5-205 (1986); Del. Code Ann. tit.11, § 900A(a) (Supp. 1988); Idaho Code § 18-3106(f) (1987); La. Rev. Stat. Ann. § 14:71(G) (1986 & Supp. 1989); Minn. Stat. Ann. § 609.535

mented bad check restitution programs whereby the prosecutor may defer prosecution if the defendant agrees to pay restitution.[54] There have been repeated attempts by creditors to use the criminal process to collect debts under such statutes. Bankruptcy courts have decried the use of bad check criminal prosecutions for this purpose and have enjoined creditors who have attempted to use such tactics.[55] Nor has this form of debt collection been limited to bad check cases. *See In re Van Riper,*

(West 1987 & Supp. 1990); Miss. Code Ann. § 97-19-67 (Supp. 1988); Mont. Code Ann. § 45-6-316 (1988); Neb. Rev. Stat. § 28-611(6) (Supp. 1988); N.C. Gen. Stat. § 14-107 (1986); Tex. Penal Code Ann. § 32.41(e) (Vernon 1989); Wis. Stat. Ann. § 943.24 (West 1982 & Supp. 1989); Wyo. Stat. Ann. § 6-3-702(c) (1983).

[54] *E.g.*, Ariz. Rev. Stat. Ann. § 13-1810(E) (1989) (county attorney may defer prosecution if defendant agrees, among other conditions, to pay restitution); Fla. Stat. Ann. § 832.08 (West Supp. 1989) (restitution as condition of defendant entering bad check diversion program); Okla. Stat. Ann. tit. 22, § 111 (West Supp. 1990) (district attorney may refer defendant to Bogus Check Restitution Program); Tenn. Code Ann. § 40-3-203 (Supp. 1989) (prosecution may be deferred if defendant agrees to participate in restitution program).

[55] *In re Dettler Farms*, 58 B.R. 404 (Bankr. D. S.D. 1986) (creditor enjoined from use of criminal process to extract preference over other creditors); *In re Redenbaugh*, 37 B.R. 383 (Bankr. C.D. Ill. 1984) (creditor who deliberately waited until bankruptcy terminated before filing criminal action to obtain restitution enjoined from receiving any portion of claim that was discharged); *In re Whitaker*, 16 B.R. 917, 922 (Bankr. M.D. Tenn. 1982) (the use of criminal proceedings to compel payment of restitution "is so engrained in the criminal system of this state that the creditor . . . referred to his practice of dealing with bad checks as 'turn[ing] them into the Sessions Court for collection'"); *In re Barnett*, 15 B.R. 504, 507 (Bankr. D. Kan. 1981) ("*the vast majority of merchants and others who receive worthless checks regard law enforcement officers and the courts as mere agencies to collect their money*") (emphasis in original). Some courts have gone further and enjoined prosecutors or state courts. Respondents do not believe such orders are necessary or appropriate. *See In re Davis*, 691 F.2d 176 (3d Cir. 1982).

25 B.R. 972 (Bankr. W.D. Wis. 1982) (where creditors threatened to use the criminal process to collect a debt from a bankrupt contractor, the court held the creditors and their attorneys in contempt for violation of the automatic stay).

Considering the potential abuse inherent in the use of the criminal process to collect debts, it is understandable that Congress did not intend to make restitution orders nondischargeable *per se*.[56]

Interpreting the Code to allow a chapter 13 debtor to pay restitution through his plan does not offend the boundaries of state powers. Rather, it strikes the delicate balance between the concepts of federalism and supremacy. Congress expanded not only the definition of "debt" in enacting the Code, but also the availability of chapter 13 in order to create a comprehensive system for a fair and equitable adjustment of all financial obligations. At the same time, states may fashion other appropriate criminal remedies which will remain unaffected by bankruptcy courts.

Whether there are policy considerations behind restitution obligations that outweigh federal bankruptcy policy is a question for Congress, not for the courts. As the court of appeals stated below:

> . . . where Congress has enacted legislation which arguably affects state criminal proceedings, it is not the function of this court to cure any perceived "defects" in that legislation. That authority is granted to Congress alone.

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[56] Delegating to a state the power to decide dischargeability has also been criticized as an unwarranted enlargement of the state's role in the federal bankruptcy system. Ballam, *Kelly* v. *Robinson Revisited: Dischargeability of Restitution Obligations in Chapter 13 Bankruptcy Proceedings*, 34 St. Louis U.L.J. 1 (1989); McCafferty & Bubis, *Criminal Restitution And The Bankruptcy Discharge: Should We Reopen Debtors' Prison?* 10 Crim. Just. 27 (1987); Hennigan, *Criminal Restitution And Bankruptcy Law In The Federal System*, 19 Conn. L. Rev. 89 (1986).

In re Johnson-Allen, 871 F.2d at 428. *See also Ron Pair*, 109 S.Ct. at 1033 (where Congress chose to create a tension between principles of federalism and supremacy, there is no reason to suspect that Congress did not mean what the language of the statute says).

Here, as in *Ron Pair*, the language of the Code, specifically § 101(4), (11) and § 1328(a), is as plain as it can be and the legislative history is completely consistent. There is no reason to suspect that Congress did not mean that a restitution obligation was a dischargeable debt under § 1328(a).

Those who believe a different balance should be struck between the competing interests must address their concern to Congress, not this Court. This Court's "task is to apply the text, not to improve upon it." *Pavelic & Leflore* v. *Marvel Entertainment Group*, 58 U.S.L.W. 4038, 4039 (U.S. Dec. 5, 1989).

IV. CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES INVOLVED

(In Addition To Those Contained In The Petition For A Writ Of Certiorari)

United States Constitution, article VI, clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

11 U.S.C. § 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien

secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title:

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker,

financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of

the lease before the commencement of or during a case under this title to obtain possession of such property; or

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization
pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a

preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstance, may recover punitive damages.

11 U.S.C. § 726. Distribution of property of the estate

(a) Except as provided in section 510 of this title, property of the estate shall be distributed—

(1) first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title;

(2) second, in payment of any allowed unsecured claim, other than a claim of a kind specified in paragraph (1), (3), or (4) of this subsection, proof of which is—

(A) timely filed under section 501(a) of this title;

(B) timely filed under section 501(b) or 501(c) of this title; or

(C) tardily filed under section 501(a) of this title, if—

(i) the creditor that holds such claim did not have notice or actual knowledge of the case in time for timely filing of a proof of such claim under section 501(a) of this title; and

(ii) proof of such claim is filed in time to permit payment of such claim;

(3) third, in payment of any allowed unsecured claim proof of which is tardily filed under section 501(a) of this title, other than a claim of the kind specified in paragraph (2)(C) of this subsection

(4) fourth, in payment of any allowed claim, whether secured or unsecured, for any fine, penalty or forfeiture, or for multiple, exemplary, or punitive damages, arising before the earlier of the order for relief or the appointment of a trustee, to the extent that such fine, penalty, forfeiture, or damages are not compensation for actual pecuniary loss suffered by the holder of such claim;

(5) fifth, in payment of interest at the legal rate from the date of the filing of the petition, on any claim paid under paragraph (1), (2), (3), or (4) of this subsection; and

(6) sixth, to the debtor.

(b) Payment on claims of a kind specified in paragraph (1), (2), (3), (4), (5), (6), or (7) of section 507(a) of this title, or in paragraph (2), (3), (4), or (5) of subsection (a) of this section, shall be made pro rata among claims of the kind specified in each such particular paragraph, except that in a case that has been converted to this chapter under section 1112, 1208, or 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title or under this chapter before such conversion and over any expenses of a custodian superseded under section 543 of this title.

(c) Notwithstanding subsections (a) and (b) of this section, if there is property of the kind specified in section 541(a)(2) of this title, or proceeds of such property, in the estate, such property or proceeds shall be segregated from other property of the estate, and such property or proceeds and other property of the estate shall be distributed as follows:

(1) Claims allowed under section 503 of this title shall be paid either from property of the kind specified in section 541(a)(2) of this title, or from other property of the estate, as the interest of justice requires.

(2) Allowed claims, other than claims allowed under section 503 of this title, shall be paid in the order specified in subsection (a) of this section, and, with respect to claims of a kind specified in a particular paragraph of section 507 of this title or subsection (a) of this section, in the following order and manner:

(A) First, community claims against the debtor or the debtor's spouse shall be paid from property of the kind specified in section 541(a)(2) of this title, except to the extent that such property is solely liable for debts of the debtor.

(B) Second, to the extent that community claims against the debtor are not paid under subparagraph (A) of this paragraph, such community claims shall be paid from property of the kind specified in section 541(a)(2) of this title that is solely liable for debts of the debtor.

(C) Third, to the extent that all claims against the debtor including community claims against the debtor are not paid under subparagraph (A) or (B) of this paragraph such claims shall be paid from property of the estate other than property of the kind specified in section 541(a)(2) of this title.

(D) Fourth, to the extent that community claims against the debtor or the debtor's spouse are not paid under subparagraph (A), (B), or (C) of this paragraph, such claims shall be paid from all remaining property of the estate.

18 U.S.C. § 3613. Civil remedies for satisfaction of an unpaid fine

(a) **Lien.**—A fine imposed pursuant to the provisions of subchapter C of chapter 227 is a lien in favor of the United States upon all property belonging to the person fined. The lien arises at the time of the entry of the judgment and continues until the liability is satisfied, remitted, or set aside, or until it becomes unenforceable pursuant to the provisions of subsection (b). On application of the person fined, the Attorney General shall—

(1) issue a certificate of release, as described in section 6325 of the Internal Revenue Code, of any lien imposed pursuant to this section, upon his acceptance of a bond described in section 6325(a)(2) of the Internal Revenue Code; or

(2) issue a certificate of discharge, as described in section 6325 of the Internal Revenue Code, of any part of the person's property subject to a lien imposed pursuant to this section, upon his determination that the fair market value of that part of such property remaining subject to and available to satisfy the lien is at least three times the amount of the fine

(b) **Expiration of lien.**—A lien becomes unenforceable and liability to pay a fine expires—

(1) twenty years after the entry of the judgment; or

(2) upon the death of the individual fined.

The period set forth in paragraph (1) may be extended, prior to its expiration, by a written agreement between the person fined and the Attorney General. The running of the period set forth in paragraph (1) is suspended during any interval for which the running of the period of limitations for collection of a tax would be suspended pursuant to section 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I) of the Internal Revenue Code of 1954 (26 U.S.C. 6503(b), 6503(c), 6503(f), 6503(i), or 7508(a)(1)(I), or section 513 of the Act of October 17, 1940, 54 Stat. 1190.

(c) **Application of other lien provisions.**—The provisions of sections 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338

through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805 of the Internal Revenue Code of 1954 (26 U.S.C. 6323, 6331, 6332, 6334 through 6336, 6337(a), 6338 through 6343, 6901, 7402, 7403, 7424 through 7426, 7505(a), 7506, 7701, and 7805) and of section 513 of the Act of October 17, 1940, 54 Stat. 1190, apply to a fine and to the lien imposed by subsection (a) as if the liability of the person fined were for an internal revenue tax assessment, except to the extent that the application of such statutes is modified by regulations issued by the Attorney General to accord with differences in the nature of the liabilities. For the purposes of this subsection, references in the preceding sections of the Internal Revenue Code of 1954 to "the Secretary" shall be construed to mean "the Attorney General," and references in those sections to "tax" shall be construed to mean "fine."

(d) **Effect of notice of lien.**—A notice of the lien imposed by subsection (a) shall be considered a notice of lien for taxes payable to the United States for the purposes of any State or local law providing for the filing of a notice of a tax lien. The registration, recording, docketing, or indexing, in accordance with 28 U.S.C. 1962, of the judgment under which a fine is imposed shall be considered for all purposes as the filing prescribed by section 6323(f)(1)(A) of the Internal Revenue Code of 1954 (26 U.S.C. 6323(f)(1)(A) and by subsection (c).

(e) **Alternative enforcement.**—Notwithstanding any other provision of this section, a judgment imposing a fine may be enforced by execution against the property of the person fined in like manner as judgments in civil cases, but in no event shall liability for payment of a fine extend beyond the period specified in subsection (b).

(f) **Discharge of debts inapplicable**—No discharge of debts pursuant to a bankruptcy proceeding shall render a lien under this section unenforceable or discharge liability to pay a fine.